Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

BEULAH JOHNSON,

Petitioner,

v.

KMART CORPORATION and
BOBBY HAMILTON, Individually

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

John F. Bloss
Counsel for Petitioner
Robertson Medlin & Blocker, PLLC
127 North Greene Street, Third Floor
Greensboro, NC 27401
(336) 378-9881
(336) 378-9886 (fax)
jblosslaw@gmail com

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QUESTION PRESENTED

Whether, at the *prima facie* stage of the burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), it is appropriate for the court to review and give weight to the employer's evidence that the employee was not performing her job satisfactorily, thereby depriving the employee of the ability to show that the employer's proffered justification was pretextual.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the courts below were Beulah Johnson, Kmart Corporation, and Bobby Hamilton. There were no parties to the proceedings below other than those named in the petition.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Beulah Johnson, respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit filed on September 16, 2009.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit to which this petition relates was entered on September 16, 2009. The Fourth Circuit's opinion, reported unofficially at 332 Fed. Appx. 851; 2009 U.S. App. LEXIS 20566, is attached as Appendix A. The opinion affirmed and adopted an unpublished September 17, 2008 opinion of the United States District Court for the Eastern District of North Carolina. The district court's opinion, reported unofficially at 2009 U.S. App. LEXIS 20566, is attached as Appendix B.

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit to be reviewed was filed on September 16, 2009. This petition is filed within 90 days of that date. Rule 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY PROVISIONS, AND RULES OF COURT INVOLVED

1. The Equal Protection Clause of Section 1 of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, provides, in relevant part, as follows:

> (a) Employer practices
> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> * * *

> **(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices**
> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

3. 42 U.S.C. § 1981(a) states, in relevant part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, . . . and to the full and equal benefit of all laws and proceedings for the security of person and property.

STATEMENT OF THE CASE

A. Proceedings Below.

Petitioner filed this action in the Superior Court of Guilford County, North Carolina on October 2, 2006 seeking damages, *inter alia*, for race-based discrimination and age-based discrimination. Respondents removed this matter to the United States District Court for the Middle District of North Carolina. The action was then transferred to the United States District Court for the Eastern District of North Carolina. The district court had jurisdiction pursuant to 28 U.S.C. § 1332 as this matter involves citizens of different states with an amount in controversy greater than $75,000.00.

The district court granted Respondents' motion for summary judgment on September 16, 2008. The court ruled, as a matter of law, that Petitioner "failed to demonstrate that her job performance was satisfactory" and, accordingly, could not establish a *prima facie* case of discrimination. The court did not discuss or, apparently, consider Petitioner's evidence that Respondents' stated justifications for Petitioner's demotions were pretextual.

Petitioner timely appealed. The United States Court of Appeals for the Fourth Circuit, bestowed with jurisdiction over the appeal by 28 U.S.C. § 1291, affirmed by *per curiam* opinion on September 16, 2009.

B. Factual Background.

Petitioner has been employed by Kmart Corporation since September 1972. She was promoted to human resources manager at the end of 1999. She held that position until her demotion, the adverse employment action giving rise to this action, in December 2004.

Throughout her 32 years of active service at Kmart preceding her demotion, Petitioner performed her work in an exemplary manner. As recently as Summer 2004, six months before her demotion, Petitioner was awarded employee of the month at her store.

Respondent Bobby Hamilton became store manager, and Petitioner's supervisor, in October 2004, just two months before her demotion. Respondent Hamilton is white; Petitioner is black.

Shortly after Mr. Hamilton's arrival, on October 27, 2004, Petitioner received her annual performance appraisal. She received a rating of "Exceeds Expectations," missing the highest rating of "Exceptional" by only one point. The performance evaluation emphasized Petitioner's knowledge and effectiveness (*e.g.*, "Beulah has much knowledge in all areas of our business...." "Beulah knows her job...." "Beulah is very capable in her job...."). Indeed, Bobby Hamilton acknowledged at deposition that Petitioner had received a good annual review and that the review in no way intimated that a demotion was about to occur.

There is no contention from Respondents, and certainly no evidence in the record, that Petitioner's work declined between this review and her demotion less than two months later. Further, Petitioner averred that she was neither counseled nor disciplined in any manner between her "Exceeds Expectations" employment review and her demotion two months later on December 22, 2004. It is indisputed that no one suggested to her that she needed to improve her performance or face demotion.

Bobby Hamilton testified at deposition, however, that he *did* discipline Ms. Johnson twice before the demotion, and that he placed written records of these alleged disciplinary actions in Petitioner's personnel file. Petitioner vigorously disputed this allegation. Kmart admitted in discovery that there are no such records in Petitioner's file. Indeed, other than Bobby Hamilton's testimony, Respondents have failed to produce a shred of evidence of such purported discipline.

Respondent Bobby Hamilton demoted Petitioner to an entry-level customer service position on December 22, 2004. The demotion came as a complete shock to Johnson as she had never received any suggestion that her position was in jeopardy. Petitioner was replaced as human resources manager by Becky Archibald. Ms. Archibald had only worked for Kmart for one month prior to her promotion, was not qualified for the position of human resources manager, and was young and white.

After her demotion, Petitioner repeatedly complained to both her district and regional managers about the fact that she had been demoted as a result of her age and race. These managers refused to talk to her. Kmart did not investigate Petitioner's complaints of age and race discrimination, in violation of its internal policies. Hamilton responded to Petitioner's complaints by demoting her to a part-time position.

Petitioner filed an EEOC charge of age and race discrimination in March 2005. As before, Hamilton reacted to Johnson's complaints by demoting her to an even less desirable position, "lay-a-way associate."

Bobby Hamilton maintained that he discovered shortly after Petitioner filed her EEOC charge that his alleged documentation of disciplinary action was missing from Petitioner's personnel file. Kmart's representative testified at deposition that Kmart would have expected a store manager to investigate such an alteration of a file. Nevertheless, it is undisputed that Bobby Hamilton took no effort to investigate the disappearance of the documentation of the alleged disciplinary action.

Petitioner proffered direct evidence of Bobby Hamilton's racial bias. On several occasions, he referred to Petitioner's "black ass." In addition, after Petitioner filed her EEOC charge, Hamilton advised Petitioner that he was demoting her a second time—to lay-a-way associate—to get the "monkey" off his back.

In their arguments below, Respondents justified the demotion by placing blame on Petitioner for delays in completing store employees' performance evaluations. Petitioner averred, however, that she delivered the evaluation forms to her supervisors in a timely manner, and that she could not compel the supervisors to complete such evaluations because she was not in their chain of command. According to Kmart policy, Petitioner's proper response to the supervisors' failure to complete the evaluations was to bring the matter to the attention of the store manager. Petitioner did precisely that, but the store manager did not correct the problem. Indeed, Bobby Hamilton never disciplined or counseled Petitioner about employee evaluations or advised her that she needed to improve in this area of her work.

Respondents also blamed Petitioner for problems relating to associate scheduling. However, Petitioner could not generate the schedules without input from the store manager and assistant managers, and such input was often late. Petitioner, who had no way to force the supervisors to provide the information, reported the problems to Bobby Hamilton, who had the ultimate authority and responsibility to ensure that the schedules were generated in a timely manner. Again, prior to the demotion, Bobby Hamilton never disciplined or counseled Petitioner about the schedules, or told her that she needed to improve this area of work.

It is common ground that Petitioner's filing was not current at the time Respondents demoted Petitioner.

Petitioner frequently brought up this issue with Bobby Hamilton. His response was to continually assign Petitioner special tasks that took her out of the personnel office for days at a time. Indeed, Bobby Hamilton acknowledged at deposition that Petitioner told him that the filing was not current because of the extra tasks he was assigning her. Mr. Hamilton nevertheless continued to assign her extra tasks until her demotion. Once again, Bobby Hamilton never counseled or disciplined Petitioner about the filing, or told her that the backlog of filing was a problem.

REASONS TO GRANT THE PETITION

I. Summary of Argument.

The Fourth Circuit's requirement that a person who was an employee at the time of the employer's adverse action must demonstrate, at the *prima facie* stage, not only that she was "qualified," as set forth in *McDonnell Douglas*, but also that her "job performance was satisfactory," prematurely puts at issue the question of whether employee's performance was acceptable to the employer. A court's consideration of competing evidence relating to a satisfactory-performance requirement for the establishment of a *prima facie* case cannot be reconciled with this Court's attempts to simplify the order of proof in employment discrimination cases.

By allowing the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection" in the *prima facie* phase, rather

than in the second phase, of the *McDonnell Douglas* inquiry, the Fourth Circuit effectively precludes the employee from rebutting the employer's proffered justification as pretext. That is exactly what happened to Petitioner below: The courts concluded that she did not establish her *prima facie* case in light of Respondents' evidence—disputed by Petitioner—that her job performance was not satisfactory. As a result, Petitioner's evidence that the after-the-fact justifications for her termination were mere pretext was never considered.

The criteria articulated by the Circuit Courts of Appeal relating to standard of proof for an employee to establish her *prima facie* case are widely divergent. Moreover, given the fact that the Fourth Circuit's standard effectively collapses the *McDonnell Douglas* analysis, precluding the opportunity for the employee to establish that the employee's justification was pretextual, there is a compelling need for this Court to recenter a jurisprudence that has run off course.

II. Consideration of the Employer's Justifications for the Adverse Employment Action in the Analysis of Whether the Employee Has Established a *Prima Facie* Case Bypasses the *McDonnell Douglas* Burden-Shifting Analysis and Deprives the Employee of the Opportunity to Show Pretext.

A discussion of the burden of proving a discrimination-in-employment claim under Title VII or 42 U.S.C. § 1981 must begin with the standards

set forth by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In the absence of direct evidence of discrimination, the Court instructed, the plaintiff must come forward with evidence sufficient to create an inference that a basis for an adverse employment-related decision was race:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a *prima facie* case of racial discrimination. This may be done by showing: (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802. The plaintiff's initial burden under *McDonnell Douglas* is "not onerous." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

In the long-familiar burden-shifting analysis announced in *McDonnell Douglas*, if a *prima facie* case is made, the onus then shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* The third stage is the plaintiff's burden of proving that the

reason proffered by the employer was not legitimate and nondiscriminatory, but was "pretextual." *Id.*

The Fourth Circuit, in this case and others, "has used slightly different factors under the *McDonnell Douglas* scheme when a discrimination claim involves the employee's discharge." *Blair v. Colonnas Shipyard, Inc.*, 52 F. Supp.2d 687, 693 (E.D. Va. 1999), *aff'd*, 203 F.3d 819 (4th Cir. 2000). Specifically—in situations where the plaintiff was already an employee at the time the employer took the adverse action—the Fourth Circuit has modified *McDonnell Douglas*'s second prong to require that the employee demonstrate at the *prima facie* stage that she "was qualified for her job *and her job performance was satisfactory*." (emphasis added; citations omitted). *Karpel v. Inova Health Sys. Svcs.*, 134 F.3d 1222, 1228 (4th Cir. 1998). *See also Williams v. Cerberonics, Inc.*, 871 F.2d 452, 455 (4th Cir. 1989).

The Fourth Circuit's requirement that an employee demonstrate at the *prima facie* stage that her job performance was "satisfactory" begs the question: *satisfactory to whom*? The introduction of the satisfactory-performance requirement has, perhaps inevitably, led the courts within the Fourth Circuit to scrutinize, at the *prima facie* stage, *the employer's* evidence tending to show that the employee's performance was unacceptable to the employer. *See, e.g., Karpel, supra* ("Because the record clearly demonstrates that Karpel's job performance was unsatisfactory, we are also unable to infer discriminatory intent under the *McDonnell Douglas*

scheme. Karpel was repeatedly tardy, had multiple inadequate medpasses, and failed to submit any of her required monthly summaries. Karpel does present evidence that there were other employees who were late, or had inadequate medpasses, or were delinquent in submitting their monthly summaries. This does not nullify the fact that Karpel's job performance was inadequate"); *Mungro v. Giant Food, Inc.*, 187 F. Supp.2d 518, 522 (D. Md. 2002) ("Plaintiff has failed to demonstrate, however, that his job performance was satisfactory. Plaintiff's own belief that his performance was satisfactory, without more *and in the face of Defendant's assertions that he twice violated company policy*, is not enough to meet Plaintiff's burden" (emphasis added)), *aff'd sub nom. Skipper v. Giant Food, Inc.*, 68 Fed. Appx. 393, 2003 U.S. App. LEXIS 11562 (4th Cir.), *cert. denied*, 540 U.S. 1074 (2003); *Blair v. Colonnas Shipyard, Inc.*, *supra*, 52 F. Supp.2d 687, 693 (employee who violated policies his employer considered "very important" did not perform his job satisfactorily and therefore did not establish a *prima facie* case of race discrimination).

This Court has suggested that the determination of whether the plaintiff has made a *prima facie* case should be based solely on the *plaintiff's* evidence. *See Texas Dept. of Community Affairs v. Burdine*, *supra*, 450 U.S. at 254 ("If the trier of fact believes *the plaintiff's evidence*, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case" (emphasis added)). Plaintiff submits that in the context of the employee's *prima*

facie case, only the employee's evidence should be considered.[1] Otherwise, the first and second phases of the *McDonnell Douglas* analysis will inevitably be conflated, resulting in a substantial likelihood (as was the case in the courts below) that the plaintiff will lose her opportunity to rebut the defendant's proffered nondiscriminatory reasons for adverse employment action.

III. The Lower Courts are Divided.

Some Circuit Courts of Appeal have declined to modify the second *McDonnell Douglas* requirement for the *prima facie* case in the context of a plaintiff who was employed when the adverse employment action was taken (as opposed to a plaintiff who applied for, but was not offered, a job). These courts require only a showing of continued "qualification" for the position, rather than any demonstration of satisfactory performance. These Circuits include the Fifth and Eighth Circuits. *E.g.*, *Bienkowski v. American Airlines*, 851 F.2d 1503, 1506 (5th Cir. 1988) ("The requirement that a plaintiff prove he is meeting his employer's reasonable expectations represents an imperfect attempt at analogy with *McDonnell Douglas*. . . . Consequently, a plaintiff

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[1] Even if job "performance," rather than mere qualification, is an appropriate standard, the employer should not be given the opportunity to present conflicting evidence at the *prima facie* stage. *Accord Freeman v. Package Machinery Co.*, 865 F.2d 1331, 1335 (1st Cir. 1988) (plaintiff "tendered some evidence which, if believed, proved that he was doing his chores proficiently. That burden of production having been met, the job-performance integer of the *prima facie* case was put in place").

challenging his termination or demotion can ordinarily establish a *prima facie* case of age discrimination by showing that he continued to possess the necessary qualifications for his job at the time of the adverse action. The lines of battle may then be drawn over the employer's articulated reason for its action and whether that reason is a pretext for age discrimination" (footnote omitted)); *McGinnis v. Union Pac. R.R.*, 496 F.3d 868, 874 n.2 (8th Cir. 2007) ("Under the qualification prong, a 'plaintiff must show only that he possesses the basic skills necessary for performance of the job,' not that he was doing it satisfactorily. The district court incorrectly applied a higher standard than required to establish a prima facie case").

Other Circuits require the employee to make some showing of satisfactory job performance to establish her *prima facie* case, but refuse to consider the employer's conflicting evidence at that stage of the analysis.[2] *E.g.*, *Freeman v. Package Machinery Co.*,

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[2] It is straightforward that courts in these jurisdictions would have concluded that Petitioner established her *prima facie* case of employment discrimination. These courts have instructed, for example, that longevity in employment is sufficient to demonstrate the level of "qualification" required by the *prima facie* case. *See, e.g.*, *McGinnis v. Union Pac. R.R.*, *supra*, 496 F.3d at 874 n.2 ("[W]here discharge is at issue and the employer has already hired the employee, the inference of minimal qualification is not difficult to draw. . . . McGinnis was employed for twenty-eight years before his discharge and did not receive any citations for violating work rules in his first twenty-three years of employment. McGinnis clearly met the minimal qualification standard (citation omitted)); *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 91-92 (2d Cir.) ("[T]here is no basis for the district court's conclusion that

865 F.2d 1331, 1335 (1st Cir. 1988) (plaintiff established *prima facie* case "notwithstanding defendant's adamantine insistence that plaintiff's job performance was not up to snuff. Freeman tendered some evidence which, if believed, proved that he was doing his chores proficiently. That burden of production having been met, the job-performance integer of the *prima facie* case was put in place"); *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 91-92 (2d Cir.) ("The qualification prong must not . . . be interpreted in such a way as to shift onto the plaintiff an obligation to anticipate and disprove, in his *prima facie* case, the employer's proffer of a legitimate, non-discriminatory basis for its decision. As we have repeatedly held, the qualification necessary to shift the burden to defendant for an explanation of the adverse job action is minimal; plaintiff must show only that he "possesses the basic skills necessary for performance of [the] job." (citations omitted), *cert. denied*, 534 U.S. 951 (2001); *Wexler v. White's Fine Furniture*, 317 F.3d 564, 574-

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Slattery lacked even minimal qualification for a job whose duties he had been performing for seven years"), *cert. denied*, 534 U.S. 951 (2001); *Hogan v. State of Conn. Jud. Branch*, 220 F. Supp.2d 111 (D. Conn. 2002) (five-year term of employment sufficient to raise issue of fact whether plaintiff was qualified for job), *aff'd*, 64 Fed. Appx. 256 (2d Cir. 2003). Aside from Petitioner's length of service, the accolades she received from supervisors other than Bobby Hamilton in the months before her demotion, in and of themselves, would satisfy this elemnt. *See, e.g., Triplett v. Electronic Data Sys.*, 710 F. Supp. 667 (W.D. Mich. 1989), *aff'd without opinion*, 900 F.2d 260 (6th Cir. 1990) (two previous satisfactory performance appraisals sufficient to meet qualifications element of *prima facie* case).

575 (6th Cir. 2003) (en banc) ("[A] court may not consider the employer's alleged nondiscriminatory reason for taking an adverse employment action when analyzing the prima facie case. To do so would bypass the burden-shifting analysis and deprive the plaintiff of the opportunity to show that the nondiscriminatory reason was in actuality a pretext designed to mask discrimination" (citations omitted)); *Kenworthy v. Conoco, Inc.*, 979 F.2d 1462, 1470 (10th Cir. 1992) ("[A] plaintiff may make out a prima facie case of discrimination in a discharge case by credible evidence that she continued to possess the objective qualifications she held when she was hired, or by her own testimony that her work was satisfactory, even when disputed by her employer, or by evidence that she had held her position for a significant period of time" (citation, quotations omitted).

The Third Circuit deems the "satisfactory performance" requirement as an objective test, requiring that the plaintiff prove she met the "objective qualifications" of the position. *Sempier v. Johnson & Higgins*, 45 F.3d 724 (3d Cir. 1995). Under that framework, an employee need not address the subjective criteria an employer may use to evaluate an employee's performance until the pretext stage of the *McDonnell Douglas* framework.

Finally, courts in jurisdictions other than the Fourth Circuit, including the Seventh Circuit, have held, at the *prima facie* level, that the plaintiff must carry the burden of proof in demonstrating that he or she met the employer's subjective performance criteria.

E.g., Jenkins v. Lifetime Hoan Corp., 259 Fed. Appx. 863, 867, 2008 U.S. App. LEXIS 452 at *8 (7th Cir. Jan. 8, 2008) ("A plaintiff proceeding under the indirect method of proving discrimination must show that he was meeting his employer's legitimate expectations, and Jenkins has failed to meet that burden. Although Jenkins states that he was qualified for the job, he never disputes Lifetime's evidence . . . Jenkins argues that his inability to make sales appointments was excusable because he had not been provided with adequate information regarding the close-outs. But that is insufficient to establish that Jenkins was meeting Lifetime's legitimate expectations because it does not refute Lifetime's assertion that Jenkins refused to use email, did not comply with company procedures, and did not make any appointments"). As previously discussed, in a termination or demotion context, such a test invariably leads to a weighing and assessment of evidence on the ultimate issues in the case.

IV. The Question is of Great Importance and Wide Application and this Case is an Excellent Vehicle for this Court to Resolve the Question Presented.

The case under review provides a clear example of the dangers of holding a plaintiff to a subjective standard declared by the employer. The district court engaged, at the *prima facie* level, in an in-depth analysis of all the evidence before it. Unfortunately, the district court engaged in much of the type of review this Court disfavored in *Reeves v.*

Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000). There, this Court frowned upon Fifth Circuit's refusal to consider evidence of biased remarks made by a decisionmaker, disapproved of its decision to ignore other evidence of the plaintiff, and disapproved of its decision to credit the employer's evidence more highly than the plaintiff's evidence.

Likewise, here, due to the conflation of the first two stages of the *McDonnell Douglas* analysis, the courts below ignored the racially charged remarks made by the decisionmaker about Petitioner temporally close to the complained-of demotion, bypassed evidence tendered by the plaintiff indicating the proffered reasons for her termination were pretext (including a superior performance evaluation only two months before the demotion and the fact that Respondents could not produce written disciplinary notices required by Kmart's progressive disciplinary policy), and generally credited the employer's evidence more highly than the plaintiff's. Essentially, establishment of the *prima facie* case collapses into a case on the merits, with no jury, no opportunity for cross examination or to assess the credibility of witnesses, no adherence to the Rules of Evidence, and lacking other safeguards afforded by our trial-by-jury system.

Because application of the incorrect, more demanding standard invariably results in an unfair evidentiary hearing on the ultimate issues in the case, and because of the wide variance in other solutions propounded by various courts across the country, this issue of the proper standard to be

applied in establishing the "qualification" requirement of the *prima facie* case in discharge and demotion cases is ripe for resolution by this Court.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit granting summary judgment to Respondents.

Respectfully submitted, this the 15th day of December, 2009.

John F. Bloss
Robertson Medlin & Blocker, PLLC
127 North Greene Street, Third Floor
Greensboro, NC 27401
(336) 378-9881
(336) 378-9886 (fax)
jblosslaw@gmail.com

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-2174

BEULAH JOHNSON,

Plaintiff – Appellant,

v.

KMART CORPORATION; BOBBY HAMILTON, Individually,

Defendants – Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. W. Earl Britt, Senior District Judge. (5:07-cv-00084-BR)

Submitted: September 1, 2009 Decided: September 16, 2009

Before KING, SHEDD, and AGEE, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Thomas B. Kobrin, Greensboro, North Carolina, for Appellant. Kevin S. Joyner, Robert A. Sar, OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C., Raleigh, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM

Beulah Johnson appeals the district court's order granting Defendants' summary judgment motion on her claims alleging employment discrimination, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17 (2006) ("Title VII"), 42 U.S.C. § 1981 (2006), and the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621 to 634 (2006), as well as her Title VII retaliation and state tort claims. We have reviewed the record and find no reversible error. Accordingly, we affirm the district court's order. *Johnson v. KMart Corp.*, No. 5:07-cv-00084-BR (E.D.N.C. Sept. 17, 2008). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:07-CV-84

BEULAH JOHNSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
KMART CORPORATION and BOBBY HAMILTON, Individually,	)	
	)	
Defendants.	)	

This matter is before the court on defendants' motion for summary judgment. The motion has been fully briefed and is ripe for disposition.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff began her employment with defendant Kmart Corporation ("Kmart") in September 1972. (Verified Compl. ¶ 4; Pl. Aff. ¶ 2; Pl. Dep. at 7, 15.) In approximately January 2000, Kmart promoted plaintiff to the position of human resources manager[3] at Store No. 4826 in Fayetteville, North Carolina, at a salary of $13.41

[3] Kmart had various titles for this position, but the essential duties remained the same. (Hamilton Dep. at 33.)

per hour, and she had that position until December 2004. (Verified Compl. ¶ 5; Pl.Aff. ¶ 2; Pl. Dep. at 22.) Defendant Bobby Hamilton ("Hamilton") became plaintiff's store manager in October 2004. (Verified Compl. ¶ 6; Hamilton Dep. at 18.) Hamilton was told by the district manager that Store No. 4826 "was a disaster[,] . . . . out of control . . . . There was nothing in the store that was up to any standard that Kmart Corporation wanted." (Hamilton Dep. at 18-19.)

As a human resources manager, plaintiff's job duties included creating the weekly work schedule for all employees at Store No. 4826, supervising the employee review process, maintaining the store's personnel files according to Kmart corporate policy, tracking employees' vacation time, maintaining the employee training room and training new employees, and doing the payroll. (Pl. Dep. at 26-27, 32, 39, 45-46, Hamilton Dep. at 24, 33, 40, 45, 50.)

In January 2003, plaintiff had been placed on a thirty-day probation for failing "to insure [sic] that all associates understand the vacation policy and that all procedures concerning the payment of vacation to active and terminating associates are handled properly." (Pl. Dep., Defts.' Exh. 9; see also Pl. Aff. ¶ 6.) Plaintiff received an annual review on 27 October 2004. (Pl. Aff., Exh. 1 (10/27/04 evaluation).) Although the overall review found that plaintiff "exceed[ed] expectations," it noted (among other things) that plaintiff "must develop a way to stay current on paperwork . . . [and] must strive to

improve her time use and completion of schedules and associate evaluations."[4] (Pl. Aff., Exh. 1 (10/27/04 evaluation); *see also* Pl. Dep. at 100 (plaintiff was told during the evaluation "to please try to make sure that [she] kept [her] paperwork up").)[5] Hamilton testified that between October and December 2004, he counseled plaintiff[6] on several perceived deficiencies in her work, including problems with the weekly work schedule, filing, and improper recording of employees' vacation time.[7] (Hamilton Dep. at 29, 42, 47.) However, Hamilton

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[4] Employee reviews were performed annually and formed the basis for each employee's annual pay raise, so an employee would not receive a pay raise until his or her review was completed and "keyed into the system" by the human resources manager. (Hamilton Dep. at 34.) When Hamilton discovered the backlog in employee reviews, "[s]ome of the associates dated back . . . eight months to a year . . . . and so [Kmart] had associates that were being paid large sums of money as back pay." (Hamilton Dep. at 134.)

[5] Plaintiff acknowledges that she had gotten behind in maintaining her paperwork while she took some personal leave earlier in 2004, and that it may not have been "completely caught up" between October 2004, when she received her annual review, and December 2004, when Hamilton demoted her. (Pl. Dep. at 158.)

[6] In her affidavit submitted in opposition to the instant motion, plaintiff disputes that Hamilton "[]ever counseled [her] regarding [her] performance[.]" (Pl. Aff. ¶ 8); however, for the reasons stated *infra*, the court finds that this is not an issue of material fact precluding entry of summary judgment.

[7] Hamilton discovered that plaintiff had recorded several employees' vacations "as salary during the week" rather than vacation time, "which basically allowed an associate to have

"never used the word[s] Kmart policies or endangering her job." (Hamilton Dep. at 51; *see also* Pl. Aff. ¶ 8 ("Hamilton never told [plaintiff] that [her] position was in danger until the meeting in which [she] was demoted").)

A Kmart employee "from regional human resources" came to Store No. 4826 in December 2004, "just prior to [plaintiff]'s release from personnel manager" and told Hamilton that plaintiff's office "was the worst personnel office that he had ever been in" and that Hamilton "needed to remove [plaintiff] from that position. That she did not know what she was doing." (Hamilton Dep. at 60.) Hamilton demoted plaintiff on 22 December 2004. (Hamilton Dep. at 60.) Prior to demoting plaintiff, Hamilton "discussed it with [his] district manager . . . . [and] it was a mutual decision" to demote her. (Hamilton Dep. at 65.) As reasons for the demotion, Hamilton listed untimely employee raises and backpay, complaints from associates, plaintiff's "disorganized office," and plaintiff's failure to adequately, correctly and timely make the weekly employee schedule. (Pl. Dep., Defts.' Exh. 11.)

Hamilton promoted Becky Archibald to the human resources manager position. (Hamilton Dep. at 111.) Archibald was "a white female who was approximately 28 years old" at the time of the promotion, and "had only worked for Kmart . . . for

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more time than they needed – were supposed to get for vacation." (Hamilton Dep. at 46.)

one month" as a cashier. (Pl. Aff. ¶ 9; Hamilton Dep. at 103, 111.) However, "she had . . . been a manager at McDonald's, and . . . . . had experience in managing associates," including training and scheduling employees and "maintain[ing] paperwork[.]" (Hamilton Dep. at 111-12.)

Hamilton placed plaintiff in a "temporary position" in customer service "until [he] could find something else for her." (Hamilton Dep. at 72-73.) Plaintiff's transfer to customer service was accompanied by a decrease in her pay, to $11.50 per hour, which was in part a decision of the district manager, who "said that . . . [plaintiff's] pay needed to be similar to the other pay rates" for employees who worked in customer service. (Hamilton Dep. at 73.) Plaintiff's pay was increased to $12.91 per hour in February 2005. (Pl. Dep. at 162.) After transferring plaintiff to the customer service department, Hamilton moved her from being a full-time employee with benefits such as health insurance to a part-time employee with no benefits. (Hamilton Dep. at 82.) In addition, plaintiff was required to work nights and weekends. (Pl. Dep. at 184.) Although moving plaintiff to part-time was in part the result of a Kmart restructuring that required stores to cut the number of employees working full-time, Hamilton's decision to apply the restructuring to plaintiff was the result of his "personal observation[s]" of all the employees at Store No. 4826, including plaintiff. (Hamilton Dep. at 82.) However, when Kmart permitted Hamilton to "have a full-time layaway associate" in April 2005, he offered the job to plaintiff and she accepted it.

(Hamilton Dep. at 88-89.) On 3 June 2005, plaintiff injured herself while working in the layaway department, and she has not returned to work at Kmart since that time, although she is eligible. (Pl. Dep. at 146-47; Hamilton Dep. at 98.)

Plaintiff contends that during the time she and Hamilton worked together, Hamilton made several comments to her which she perceived as discriminatory based on either her race or her age.[8] Plaintiff contends that prior to removing her from the human resources manager position, Hamilton made two references to plaintiff using the phrase "black ass," (Pl. Dep. at 113, 115), that he told her that he was offering her the full-time position in layaway "to get that monkey off his back[,]"[9] (id. at 121), and that she "'need[ed] to move faster,'" (id. at 123).

Plaintiff called Kmart's regional manager to complain immediately after her transfer to customer service, but spoke "[m]ainly to his assistant" in the phone call. (Pl. Dep. at 165; see also Jemo Dep. at 29 (plaintiff called the regional manager's assistant on one occasion to complain "that she was removed from a position and received a pay decrease"); Pl. Aff. ¶ 10

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[8] Hamilton denies making these comments, (Hamilton Dep. at 97-98), but for the reasons stated *infra*, the court finds that this is not an issue of material fact precluding entry of summary judgment.

[9] Although defense counsel characterizes this statement as "a commonly used, racially-neutral phrase," (Br. Supp. Mot. Summ. J. at 21), for purposes of the instant motion, the court accepts plaintiff's contention that it has a racist connotation.

("[t]he regional manager . . . refused to talk to [plaintiff, but] . . . . would have his secretary call [plaintiff] back").) Plaintiff also "repeatedly tried to report the situation to [her] district manager[,]" but he "always cancelled or missed [the] . . . appointments" that he scheduled with her to discuss her complaint. (Pl. Aff. ¶ 10.) Kmart did not investigate plaintiff's complaints until after she filed an EEOC charge, and plaintiff did not tell anyone at Kmart that she intended to file an EEOC charge prior to doing so on 10 March 2005. (Pl. Dep. at 164-65; Hamilton Dep. at 15; Jemo Dep. at 34.)

The EEOC sent plaintiff a notice of right to sue, and she filed the instant action on 2 November 2006 in the Middle District of North Carolina. The case was transferred to this district by order filed 22 February 2007, and by order filed 30 July 2007, this court dismissed several claims. As to Kmart, the remaining claims are for violations of 42 U.S.C. § 1981, Title VII, and the Age Discrimination in Employment Act ("ADEA"), as well as state law claims of negligent and intentional infliction of emotional distress. (Verified Compl., Counts I, III-VI.) As to Hamilton, the remaining claims are state law claims of negligent and intentional infliction of emotional distress. (Verified Compl., Counts V-VI.)

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate in those cases in which there is no genuine dispute as to a material

fact, and in which it appears that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Haavistola v. Community Fire Co. of Rising Sun, Inc.*, 6 F.3d 211, 214 (4th Cir. 1993). Summary judgment should be granted in those cases "in which it is perfectly clear that no genuine issue of material fact remains unresolved and inquiry into the facts is unnecessary to clarify the application of the law." Id. In making this determination, the court draws all permissible inferences from the underlying facts in the light most favorable to the party opposing the motion. "[W]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate ." *Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 119 (4th Cir. 1991).

B. Race Discrimination Claim

As to plaintiff's race discrimination claim under § 1981 and Title VII,[10] plaintiff lacks any direct evidence of race discrimination,[11] and therefore the court applies the burden-shifting analysis first

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[10] Plaintiff has brought her claim for race discrimination under both Title VII and § 1981, and "the court [may] appl[y] the same analysis . . . under both statutes." *Onuoha v. Grafton School, Inc.*, 182 F. Supp. 2d 473, 479 (D. Md. 2002) (citing *Spriggs v. Diamond Auto Glass II*, 242 F.3d 179, 183 (4th Cir. 2001)).

[11] While plaintiff points to Hamilton's derogatory comments as "direct evidence of [his] racial bias[,]" (Br. Opp. Mot. Summ. J. at 14), isolated comments are insufficient to show direct evidence of racial discrimination. *See Onuoha*, 182 F. Supp. 2d

articulated by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). In order to survive summary judgment, plaintiff must establish a *prima facie* case of discrimination, defendant must in turn offer a legitimate, non-discriminatory reason for the allegedly discriminatory act, and plaintiff must then finally "show that [defendant]'s stated reason for [the act] . . . was in fact pretext." *Id.* at 804.

> To make out a *prima facie* case of discriminatory demotion, [plaintiff] must demonstrate that:
> (1) she is a member of a protected class,
> (2) she was qualified for her job and her performance was satisfactory,
> (3) despite her qualifications she was removed from her . . . position and reassigned to a[nother] position, and
> (4) the . . .position remained open to similarly qualified applicants after her reassignment.

Oguezuonu v. Genesis Health Ventures, Inc., 415 F. Supp. 2d 577, 584 (D. Md. 2005). Kmart disputes only the second element of the *prima facie* case. (Br. Supp. Mot. Summ. J. at 15.)

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at 480 ("all offensive language is not direct evidence [of racial discrimination]. To prove discriminatory animus, the derogatory remark cannot be stray or isolated and unless the remarks upon which plaintiff relies were related to the employment decision in question, they cannot be evidence of discrimination." (quotations, citations, and alteration omitted)).

The court agrees with Kmart that plaintiff has failed to demonstrate that her job performance was satisfactory. While plaintiff has asserted her belief that she was performing the human resources job in a satisfactory manner,

> [w]hat matters is not the employee's "self-perception" regarding the quality of his job performance, but "'the perception of the decision-maker. . . .'" *Farasat v. Paulikas*, 32 F.Supp.2d 249, 255 (D. Md. 1998), *aff'd* 166 F.3d 1208, 1998 WL 887017 (4th Cir. 1998) (quoting *Smith v. Flax*, 618 F.2d 1062, 1067 (4th Cir. 1980)). This is true regardless of the wisdom of the policy in question, or the wisdom of strict adherence to it, neither of which are within the court's purview to question. The court does not sit as a "'super-personnel department'" and thus cannot "decide whether the reason [for the termination] was wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiff's termination." *DeJarnette v. Corning, Inc.*, 133 F.3d 293, 299 (4th Cir. 1998) (quoting *Giannopoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 410 (7th Cir. 1997)). A plaintiff who violates company policy and fails to improve his performance despite a warning has not demonstrated

> satisfactory performance. *See, e.g., Blair v. Colonnas Shipyard, Inc.*, 52 F. Supp. 2d 687, 694 (E.D. Va. 1999), *aff'd* 203 F.3d 819, 2000 WL 4917 (4th Cir. 2000) (finding that an employee who violated policies his employer considered "very important" did not perform his job satisfactorily and therefore did not establish a prima facie case of race discrimination); *Farasat*, 32 F. Supp. 2d at 254-55 (rejecting discriminatory termination claim of plaintiff who was repeatedly tardy, despite receiving written warnings, and who violated company policy).

Mungro v. Giant Food, Inc., 187 F. Supp. 2d 518, 522 (D. Md. 2002).

In the instant case, regardless of whether Hamilton ever counseled plaintiff on any perceived deficiencies in her work, plaintiff's 27 October 2004 annual review, performed by another supervisor, noted that plaintiff was not completing several of her job duties in a timely or adequate manner, and plaintiff herself acknowledged that many of the job performance issues raised in the review had not been fully corrected at the time of her demotion. Plaintiff asserts that she "was correctly handling employee evaluations for several months prior to the demotion[,]" (Br. Opp. Mot. Summ. J. at 6 (citing Pl. Aff. ¶ 3, Hamilton Dep. at 37); however, the employee evaluations were only one reason Hamilton gave for removing plaintiff from the

human resources manager position, and he listed employee scheduling as another reason, which had also been an issue in plaintiff's annual review. "Plaintiff has adduced no evidence that the complaints regarding [her] performance were so unfounded as to constitute a pretext for [her demotion] . . . , and can cite no direct or circumstantial evidence of discriminatory . . . animus. Whether [Kmart]'s decision was unfair, rash, or imprudent is irrelevant; in the absence of a discriminatory . . . motive, . . . employment decisions may not be second guessed by this [c]ourt." *Bradley v. CMI Industries, Inc.*, 17 F. Supp. 2d 491, 498 (W.D.N.C. 1998). Accordingly, the court will grant summary judgment to Kmart on this claim.

C. ADEA Claim

As with plaintiff's race discrimination claim, the court applies the *McDonnell Douglas* burden-shifting analysis.[12]

> That scheme requires that [p]laintiff prove, by a preponderance of the evidence, a prima facie case of discrimination. To prove her prima

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[12] As with plaintiff's race discrimination claim, she has no direct evidence of age discrimination, because isolated comments are insufficient to constitute direct evidence. *See Alderman v. Inmar Enterprises, Inc.*, 201 F. Supp. 2d 532, 540 (M.D.N.C. 2002) (retiring company president's "observation that he was leaving behind a 'younger organization' was an isolated comment that cannot be attributed to [d]efendants in the form of direct evidence of age discrimination.").

> facie case, [p]laintiff must establish the following four basic elements:
> 1) that she is a member of the protected age group, that is, at least forty years of age[];
> 2) that she was discharged or demoted from her job;
> 3) that she was performing her job at a level that met her employer's legitimate expectations; and
> 4) following her termination, she was replaced by a substantially younger employee.

Alderman, 201 F. Supp. 2d at 541 (citations omitted).

As with plaintiff's race discrimination claim, the court agrees with Kmart that plaintiff has not shown that she was meeting her employer's legitimate job expectations, and therefore has not made a *prima facie* case. Accordingly, the court will grant summary judgment to Kmart on this claim.

D. Retaliation Claim

To prove a *prima facie* case of retaliation under Title VII, plaintiff must show that "(1) she engaged in a protected activity; (2) the employer took an adverse employment action against her; and (3) a causal connection existed between the protected activity and the asserted adverse action." *Von Gunten v. Maryland*, 243 F.3d 858, 863 (4th Cir. 2001). If plaintiff can "establish[] the elements of her *prima*

facie case, the burden shifts to [Kmart] to proffer evidence of a legitimate, non-discriminatory reason for taking the adverse employment action." *Matvia v. Bald Head Island Mgmt.*, 259 F.3d 261, 271 (4th Cir. 2001).

The court finds that plaintiff has not established a *prima facie* case. There is no question that plaintiff engaged in activity protected by Title VII when she made her informal complaints to the regional manager and his assistant after being transferred to the customer service position and receiving a pay decrease of approximately fifteen percent. *See Laughlin v. Metropolitan Washington Airports Auth.*, 149 F.3d 253, 259 (4th Cir. 1998) ("Opposition activity encompasses utilizing informal grievance procedures as well as staging informal protests and voicing one's opinions in order to bring attention to an employer's discriminatory activities." (citations omitted)). In addition, there is no question that plaintiff's further demotion to part-time employment – accompanied by a loss of employee benefits – is an adverse employment action. *See Jeffers v. Thompson*, 264 F. Supp. 2d 314, 329 (D. Md. 2003) ("Inquiry into the adverse nature of an employer's action typically focuses on whether the employee has suffered discharge, demotion, decrease in pay or benefits, loss of job title or supervisory responsibility, or reduced opportunities for promotion." (citing *Boone v. Goldin*, 178 F.3d 253, 255 (4th Cir. 1999)).

However, plaintiff has not shown a causal connection between her protected activity and Hamilton's

decision to place her on part-time status.[13] The evidence before the court indicates that at the time he made plaintiff a part-time employee, Hamilton was unaware that plaintiff had complained to the regional and district managers and that Kmart did not look into plaintiff's complaints until after plaintiff filed her EEOC charge. (Hamilton Dep. at 15; Jemo Dep. at 34; Pl. Aff. ¶ 10.) Plaintiff offers only her speculation that "[a] manager of . . . Hamilton's experience could easily predict that such complaints would lead to an EEOC charge[,]" (Br. Opp. Mot. Summ. J. at 15), yet acknowledges that she did not tell anyone at Kmart that she planned to file an EEOC charge, (Pl. Dep. at 164-65). Thus, the court concludes that plaintiff has not shown a

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[13] Because Kmart focuses primarily on the filing of plaintiff's EEOC charge and plaintiff's transfer from part-time in customer service to full-time in layaway, (Br. Supp. Mot. Summ. J. at 23-25), the court quickly reviews the evidence in the case in the light most favorable to plaintiff. Hamilton removed plaintiff from the human resources manager position to a position in customer service, and gave her a pay decrease of approximately fifteen percent. (Hamilton Dep. at 72-73.) Plaintiff then made several complaints about the transfer to the regional manager and/or his assistant and her district manager, and Hamilton gave plaintiff a pay raise (which was still below plaintiff's salary as human resources manager), but cut plaintiff from full-time to part-time status, meaning that she lost employee benefits such as health insurance. (Pl. Dep. at 165; Jemo Dep. at 23; Hamilton Dep. at 82.) The court agrees with Kmart that plaintiff's subsequent transfer to a full-time position in layaway was not an adverse employment action under *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (under Title VII, an adverse employment action must be material, such that it is "likely 'to deter victims of discrimination from complaining to the EEOC,' the courts, and their employers" (quotation and citation omitted)).

sufficient causal connection between her complaints to the district and regional managers and Hamilton's decision to cut plaintiff's hours and benefits, and will award summary judgment to Kmart on this claim. *See Byers v. HSBC Finance Corp.*, 416 F. Supp. 2d 424, 440 (E.D. Va. 2006) (granting summary judgment to employer on retaliation claim where employee complained to superiors about sexual advances by his supervisor and suffered an adverse employment action but "the evidence show[ed] that [the supervisor] did not know that [the employee] ever complained of sexual harassment until after [the employee] left employment with [the defendant].").

E. State Law Claims

The court agrees with defendants that they are also entitled to summary judgment on plaintiff's claims for intentional and negligent infliction of emotional distress.

> To prevail on the claim of intentional infliction of emotional distress, [p]laintiff must show: (1) that the [d]efendant engaged in extreme and outrageous conduct; (2) that the conduct was intended to cause severe emotional distress; and (3) that the conduct does in fact cause severe emotional distress. *See Waddle v. Sparks*, 331 N.C. 73 (1992). Whether the alleged conduct is sufficiently extreme and outrageous to support a claim of intentional infliction

> of emotional distress is a question of law. *See Lenins v. K-Mart Corp.*, 98 N.C. App. 590, 599 (1990). To be considered "extreme and outrageous" the conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 493 (1986). Furthermore, it is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to support a claim of intentional infliction of emotional distress.

Thomas v. Northern Telecom, Inc., 157 F. Supp. 2d 627, 634-35 (M.D.N.C. 2000) (some quotations and citations omitted). Plaintiff contends that defendants engaged in extreme and outrageous conduct when they "demoted [her] without warning[,] . . . . required [her] to work with people whom she had just supervised[, and] . . . . replaced [her] with a young, white employee who had worked for Kmart Corporation for only one month and who did not know the store's personnel or procedures." (Br. Opp. Mot. Summ. J. at 19-20.) Thus, it appears that "the sole basis for [p]laintiff's IIED claim . . . is [d]efendant[s'] . . . employment discrimination. This allegation of discrimination alone, even if true, simply cannot rise to the level of extreme and outrageous behavior." *Faulkner v. Tyco Electronics*

Corp., 552 F. Supp. 2d 546, 558 (M.D.N.C. 2008) (citations omitted).

With regard to plaintiff's claim for negligent infliction of emotional distress,

> [p]laintiff must show that [d]efendant[s] (1) negligently engaged in conduct, (2) which would reasonably and foreseeably cause [p]laintiff's severe emotional distress, and (3) which did, in fact, cause severe emotional stress . . . . [Additionally,] a plaintiff claiming NIED must still prove that her employer should have realized that its conduct involved an unreasonable risk of causing emotional distress, *Johnson v. Ruark Obstetrics and Gynecology Assocs.*, P.A., 327 N.C. 283, 304 (1990). She must also show that her employer was aware that such distress might result in her illness or bodily harm. *Id.*

Faulkner, 552 F. Supp. 2d at 559 (some citations omitted). The court agrees with defendants that plaintiff has not shown that she suffered severe emotional distress.

> Presumably, any termination will cause the discharged employee some degree of emotional upset. Plaintiff has not alleged any facts that indicate the

> [d]efendants should have reasonably foreseen that [p]laintiff would react in any way other than the usual anger and disappointment associated with being discharged.
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> Severe emotional distress is "any emotional or mental disorder, such as for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Johnson*, 327 N.C. at 304. Additionally, "mere temporary fright, disappointment or regret will not suffice." *Id.*
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> [Plaintiff's] conclusory statement[s regarding her distress are] not sufficient to state a claim for intentional or negligent infliction of emotional distress.

Swaim v. Westchester Academy, Inc., 170 F. Supp. 2d 580, 584-85 (M.D.N.C. 2001) (some citations 13 omitted).

III. CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment is ALLOWED, and this action is hereby DISMISSED.

This 16 September 2008.

/s/W. Earl Britt
Senior U.S. District Judge